

FREEDOM AND THE REPORT OF THE COMMISSION ON GOVERNMENT SECURITY

ROBERT N. SHAMANSKY*

In order to be able to judge anything, it is first necessary to establish the criterion against which to measure the thing being judged. This is as true in the field of the freedom-of-the-individual as affected by the impact of a federal loyalty-security program as in any other field. To provide such a criterion—or, perhaps more realistically, desideratum—no better resort could be had than to The Godkin Lectures at Harvard University, 1955, delivered by John Lord O'Brian and entitled "National Security and Individual Freedom."

Mr. O'Brian reminds us of the ethical and moral content of the constitution and the Bill of Rights and the American sense of fair play—that unique and peculiarly American sense of fair play—which is the natural fruit of such rich soil. This great constitutional lawyer and leader of American Bar—a man who is also acutely aware of the nature of the Communist danger—proceeds to examine the state of the freedoms traditionally enjoyed by Americans as affected by the federal loyalty-security program. He finds that the steps taken in the name of security are at variance with our heritage of constitutionalism and our American conception of fair play.

In the process of searching the American scene to determine the area in which our historic individual freedoms are jeopardized by the federal loyalty-security programs, Mr. O'Brian determined that the following governmental developments "seem to provide unmistakable evidence of an expanding trend of policies at variance" with our long-established and hard won liberties:

1. "The establishment in our jurisprudence of the doctrine imputing guilt because of associations."

2. "Conferring upon administrative officials the right to investigate and pass upon the character of opinions entertained by an individual and upon his rights under the First and Fourteenth Amendments."

3. "Adjudging men to be untrustworthy, not because of wrongful acts, but because of their ideas, because of motives attributed to them, or because of suspicion as to their future conduct."

4. "The promulgation by the Attorney General of lists of organizations thought to be subversive and the use of these lists in determining qualifications for employment."

5. "The use of secret information contributed by anonymous accusers."

*Of the Columbus, Ohio Bar.

6. "The denial of the right of cross-examination to the accused person."

7. "The lack of any constitutional protection which might be given through judicial review."

8. "The supervision and limitation of the freedom to travel by American citizens."

9. "The participation of military officials in many decisions affecting the guarantees of the Bill of Rights."

10. "The interference with the right of a citizen to work in a defense plant or on American ships."

11. "The establishment of security officers and of hearing panels in all governmental agencies drawn exclusively from governmental personnel and operating without any central supervision or determination of uniform procedures."¹

All in all, Mr. O'Brian makes a strong indictment coupled with a fervent prayer and hope that leaders will arise to stop these trends which are encroaching more and more on the individual's freedom in our society.

That Mr. O'Brian was concerned with a problem which was troubling the nation may be seen from the fact that on April 20, 1956, there was submitted the Report of the Special Committee on the Federal Loyalty-Security Program of The Association of the Bar of the City of New York² (hereinafter referred to as the New York Report) and on June 21, 1957 there was published the Report of the Commission on Government Security.³ The New York Report was financed by a grant from the Fund for the Republic, which thereafter interfered in no way with the compiling of the report; and the Commission Report was compiled and financed pursuant to Public Law 304, 84th Congress, as amended. The nine members of the Special Committee on the Federal Loyalty-Security Program were practicing lawyers from all parts of the country appointed by the President of the Association of the Bar of the City of New York, while the twelve members of the Commission on Government Security were appointed four each by the President of the United States, the President of the Senate, and the Speaker of the House of Representatives with six persons being from each of the two major political parties.

It will be the purpose of this article to compare in broad outline the New York Report with the Commission Report against the backdrop

¹ O'Brian, *National Security and Individual Freedom*, THE GODKIN LECTURES 46-48, (1955). Reprinted by permission of the publishers, Harvard University Press, Copyright, 1955, by The President and Fellows of Harvard College.

² SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT (1956).

³ COMMISSION ON GOVERNMENT SECURITY, REPORT (1957).

provided by Mr. O'Brien's points—which is to say, from a substantive freedom-of-the-individual point of view.

THE MATTER OF THE APPROACH

The approach, the viewpoint, the aim, the guiding spirit, or whatever you may wish to call it—that motivates men doing a particular job will in great measure shape the outcome of the finished product. This is especially true when the job is the re-examination of the federal loyalty-scurity program. How the results comport with the traditional American sense of fair play and constitutionalism will depend largely on the basic approach taken in each case.

The New York Approach

Part I, Chapter I,⁴ of the New York Report is entitled "Liberty and Security" and the order of these two words—"Liberty" and "Security"—cannot be taken to be mere happenstance. The Committee's approach is exemplified by the following statements:

After setting forth a description of the Communist threat and an acknowledgment that the United States must guard itself against a heretofore unprecedented threat of Communist penetration from within,⁶ the New York Report makes a balanced and cogent analysis of the elements of national security.⁷ The Committee treats four components which contribute to national strength. They are:

1. *Positive or Dynamic Security.* This means the economic and political system which provides our nation with its strength. It means encouragement of scientific and engineering progress as well as maintaining liberty in this land as an example or beacon for the enslaved peoples all over the world. In the felicitous phrase of the Report, "Liberty has a value of its own. . . ."⁸
2. *Military Security.* The ability to protect the nation militarily.⁹
3. *International Security.* Building up the economic and

⁴ NEW YORK REPORT, *op. cit. supra* note 2, at 21.

"Security is gained through liberty rather than in opposition to it . . . If fear of totalitarianism were to force us into coerced uniformity of thought and belief, we should lose security in seeking it . . . Our nation has outstripped its adversaries in the past through the increased power given by intellectual and scientific liberty. *It knows no other way.*"⁵ (Emphasis added)

⁵ *Id.* at 27.

⁶ *Id.* at 33.

⁷ *Id.* at 39-45.

⁸ *Id.* at 40.

⁹ *Id.* at 41.

military strength of allies and advancing international security and well being.¹⁰

4. *Internal Security*. The employment of measures necessary to combat espionage and subversion by the Communist movement.¹¹

Thus the New York Report deals with four of the components of national strength and denominates them *as a unit* to comprise national security.¹² It then goes on to issue this caveat:

. . . internal security should not be so developed and extended that it interferes with the continuing rapid development of science and our economy or with the sense of freedom and fair treatment by government of the ordinary citizens . . . It would be a mistake to single out security with its defensive or passive character as if it were the major element or even the whole of national security and to ignore the other elements or take them for granted . . . It is essential that account be taken of our democratic traditions of liberty and fair play . . . *We must never forget that the very purpose of national security is to preserve our independence and liberty and not merely to combat the greatest present danger to it, Communism.* (Emphasis added)

This Report follows the above with this conclusion:

What is called for is an internal security program that will make its full contribution to a balanced national security program and that at the same time will protect over the years the liberty of citizens which it is the very purpose of national security to guard:—in other words, a program that gives both efficiency and fair play.¹⁴

Having established internal security in relation to national security, which is itself one element of national strength, the New York Report divides internal security measures into two types, i.e., penal and preventative.¹⁵ The major penal laws in the internal security field are: (1) treason, (2) espionage, (3) sabotage, and (4) advocacy of the overthrow of government. The principal preventative measures are: (1) counterespionage, (2) detention, (3) publicity, (4) loyalty oaths, (5) immigration and naturalization, (6) physical security, (7) Civil Service requirements, and (8) personnel security.

After having established personnel security as one of many measures contributing to internal security, which in turn is only one of several

¹⁰ *Id.* at 41.

¹¹ *Id.* at 42.

¹² *Id.* at 42.

¹³ *Id.* at 42-43.

¹⁴ *Id.* at 45.

¹⁵ *Id.* at 45-48.

essential elements making up national security, the New York Report proceeds to examine the federal personnel security programs and then makes recommendations for their improvement.

It is believed that this step by step treatment by which the New York Committee addressed itself to the problem at hand—namely, the improvement of the Federal Loyalty-Security Program—will explain in good measure the results achieved by the New York Committee in the form of its recommendations. It was concerned with the spirit of the American people¹⁶—the spirit that can simultaneously endure the burden of security measures while insisting on the preservation and enforcement of the liberty of American citizens.

The Commission Approach

The Commission forthrightly begins the Introduction to the Federal Civilian Loyalty Program Section on page 3 of its over 800 page report by stating that “the concept that the Government should employ no disloyal citizens has been universally accepted, but the methods and standards used by the Government to rid itself of these persons have raised one of the most controversial issues of our times.”¹⁷ Further, “Federal employment is a high privilege and one which should be extended only to those who are fully qualified in every way. In these hazardous times when there is such grave danger that freedom may be banished from the face of the earth, the security of the Nation must not be needlessly exposed to compromise or injury.”¹⁸ After asserting that the disloyal can find opportunities to carry out their purpose of destroying our security *in any position in the Government* the Commission says, “This conclusion is reinforced by a consideration of personnel policy *not related to security and is the principle that disloyalty should not be rewarded by the prestige and emoluments of public employment.*”¹⁹ (Emphasis added)

To fully appreciate the import of this passage it is necessary to take up the treatment which the Commission gives to the ruling of the Supreme Court in *Cole v. Young*²⁰ which held that Public Law 733²¹ applied only to “sensitive” positions,²² i.e., activities directly concerned with the national defense. This ruling ended the application of Executive Order 10450, the order which underlies the present loyalty-security program for the federal civilian employees, to occupants of non-sensitive positions as now defined.

After devoting one paragraph and one footnote²³ to the Supreme Court’s holding, the Commission report allocates the next three and

¹⁶ *Id.* at 27.

¹⁷ COMMISSION REPORT, *op. cit.* *supra* note 3, at 3.

¹⁸ *Id.* at 4.

¹⁹ *Ibid.*

²⁰ *Cole v. Young*, 351 U.S. 536 (1956).

²¹ 5 U.S.C. §22-1 (1952).

²² Exec. Order No. 10450, 18 FED. REG. 2489 (1953).

one-half pages to arguments—including quotations from the dissent of Justices Clark, Reed and Minton²⁴—against the Court's holding. The position of the Commission, then, is that not only should all civilian employees of federal government be loyal, as an abstract principle, but that the loyalty machinery must be made to check each and every employee to determine that he *is* loyal. Regardless of the sensitivity of the position held, or the ability to directly affect the national security, the machinery must operate to stamp every individual loyal.

In sharp contrast to this, the New York Report has implicit within it a "functional" test for determining the necessity of having a loyal-security program apply to particular positions. It justifies the toll in treasure and spirit²⁵ which such a program costs the nation only when the disloyal person could do serious harm to the national security because he occupies a sensitive position which is defined as (1) having access to material classified as "secret" or "top-secret", or (2) having a policy-making function which bears a substantial relation to national security.²⁶ The Government Commission in actuality is guided by the principle that disloyalty per se must be exorcised, and justifies this by having discovered that the disloyal can find opportunities to carry out their nefarious purposes in any position in the Government.²⁷ The New York Committee will tolerate these programs because of the harm the disloyal can do if they occupy sensitive positions as defined, while the Commission makes loyalty an article of faith by asserting that all positions should be covered because all positions can be used to carry out a disloyal purpose. In other words, "loyalty" has a value of its own.

This difference in approach is basic and makes itself manifest, especially in terms of the scope or the number of persons that should be covered by the programs.

SCOPE

Regardless of the defects—as judged in the light of Mr. O'Brian's findings—that are inherent in any loyalty-security program from a qualitative standpoint, the American tradition of fair play and individual freedom would be strengthened in an absolute sense to the extent that the number of persons bearing the burden of the programs is reduced from a quantitative standpoint. This is exactly what the New York Report does, and—with one major exception²⁸—exactly what the Commission Report does not do. In fact, if the reasoning underlying the Commission Report is carried out to its logical conclusion, it is difficult to see how almost all Americans can avoid needing a security clearance.

²³ COMMISSION REPORT, *op. cit. supra* note 3, at 35, n. 24.

²⁴ *Id.* at 36.

²⁵ NEW YORK REPORT, *op. cit. supra* note 2, at 117-120.

²⁶ *Id.* at 141.

²⁷ COMMISSION REPORT, *op. cit. supra* note 2, at 4.

²⁸ Document and Information Classification-Industrial Security Programs, *infra*.

The New York Report, which deals only with the civilian personal security programs, covering approximately 6,000,000 persons, e.g. Federal Employees Program—2,300,000; Industrial Security Program of the Department of Defense—3,000,000; Atomic Energy Commission's Program for Contractors' Representatives—80,000; Port Security Program—800,000; and the International Organizations Employees Program—3,000; recommends reducing the number of persons covered from about 6,000,000 to less than 1,500,000, which is a 75% reduction.²⁹ Using the present test for a sensitive position,³⁰ there would be between 500,000 and 600,000 sensitive federal positions, 800,000 positions in the Industrial Security Program of the Department of Defense having access to "top-secret" and "secret" classified information, and the employees of Atomic Energy Commission contractors handling similarly classified information would be somewhat below the 80,000 figure mentioned above.³¹ The test for coverage recommended by the New York Report would look to each position individually and not to the agency as such. If a non-sensitive agency had a position involving policy-making functions bearing a substantial relation to national security, that position would be affected, but not the whole agency because of that position. For an obviously sensitive agency such as the Department of Defense, the same test would apply to exclude from coverage those positions having neither access to "top-secret" or "secret" classified information nor possessing a policy-making function bearing a substantial relation to the national security.³² This can fairly be described as a "functional" approach based on the recognition that loyalty-security programs in peacetime become truly justified in terms of the cost in money and human values needed to eradicate disloyalty when that disloyalty can have a material adverse effect on the national security.

The New York Committee stresses that its program recommendations would cover all positions involving a substantial danger to national security, but would not dilute the program by applications where there is no such danger. This would permit the concentration of efforts by the trained security personnel where most needed. To the argument that no person who would be a security risk in a sensitive position should hold any federal job, or in industry having access even to confidential information, the Committee finds the answer in part "in the fact that we have to choose between a more effective security system in critical posts or a less effective one in all", and the other part of the answer in the fact that there are internal security statutes which bar Communists and members of Communist-action, Communist-front, or Communist-infiltrated

²⁹ NEW YORK REPORT, *op. cit. supra* note 2, at 146.

³⁰ Exec. Order No. 10450, *supra* note 22.

³¹ NEW YORK REPORT, *op. cit. supra* note 2, at 146.

³² *Id.* at 141-142, "Access" means either authorized access or opportunity for unauthorized access.

organizations from federal employment. Also, the general suitability requirements of the Civil Service Commission continue to apply to the federal classified service.³³

With the significant exception that the industrial security program of the Department of Defense be eliminated insofar as clearances are required for contractors' employees who have access to material classified confidential,³⁴ the Commission simply maintains there is no serious questioning of the necessity for a program for screening federal civilian personnel and applicants for employment. It sees only a question as to the type of program which protects the national security with a minimum sacrifice of the rights and privileges of American citizens holding federal position, but does not see—as the New York Report does—that national security is enhanced in an absolute sense when the loyalty-security programs are restricted to positions that permit serious harm to the national security. Instead, the Commission breathes life into a concept of loyalty which takes on a life-force all its own and which feeds on more and more coverage.

INTERNATIONAL ORGANIZATIONS EMPLOYEES PROGRAM

Under Executive Order 10422, January 9, 1953, amended by Executive Order 10459, June 2, 1953, procedures were established whereby United States citizens employed by or applying for positions with international organizations³⁵ are screened by the International Organizations Employees Loyalty Board of the Civil Service Commission which makes an advisory determination for the administrative head of the employing international organization. It is the conclusion of the Commission Report that United States citizens of doubtful loyalty, who in recent years, it says, have held responsible positions in international organizations, have had the opportunity to participate in policy decisions of these organizations to an extent which would permit them to influence policy adversely to our national security.³⁶ Therefore, it is necessary to continue this loyalty program for these American citizens who are not United States Government or contractor employees. The Commission's conclusion is based on investigations of a New York Federal Grand Jury and the Internal Sub-Committee of the Senate Committee on the Judiciary³⁷, and prompts the Commission to reject the reasoning of the New York Committee which it quotes without identifying the source.³⁸

The New York part of this colloquy recommends simply that the International Organizations Employees Program be eliminated because:

- (1) The program does not protect the interests of the

³³*Id.* at 147.

³⁴ COMMISSION REPORT, *op. cit. supra* note 3, at 174, 270, 273.

³⁵ *Id.* at 426.

³⁶ *Id.* at 427.

³⁷ *Id.* at 376-386.

³⁸ *Id.* at 427.

United States as these employees are completely outside the objectives of the personnel security program since they have no access to classified information, opportunity for espionage, nor anything to do with making United States policy.

(2) The international program is actually harmful to United States interest because the clearance period encourages international organizations to employ non-Americans especially for short-term work, which could mean foreign Communists instead of American citizens are hired.

(3) The program gives needless offense to other nations by appearing to assert a special control over the international organization and can set a precedent which would be regrettable if used and followed by Communist governments.

(4) The program would only affect United States citizens who are here as a matter of right, but does not touch foreigners—including the Soviets—who come from abroad as members of the United Nations Secretariat.

(5) The international organizations have their own procedures for selecting, transferring and discharging employees, and the United States representatives could report improper conduct.

(6) The United States could still turn over information to the international organization if it determined there were positions where loyalty to a foreign power by an American might interfere with his duties to the international organizations or with America's interest.³⁹

THE PORT SECURITY PROGRAM

Consistent with its other assessments of the dangers facing the national security, the Commission report—after drawing upon the hearings before the House Committee on Un-American Activities investigating Communist activities in maritime unions⁴⁰—finds that the Port Security Program,⁴¹ which bars seamen from working on American ships unless they have “validated” documents, and which prohibits longshoremen from working in designated “restricted” port areas unless they have port security cards, is of the utmost importance to the safety of the United States.⁴² Without a validated document no seaman can work on a ship flying the American flag, although the longshoreman can at least work in those parts of a port not classified as “restricted” by the Coast Guard.

In recommending the abolition of the Port Security Program, the

³⁹ NEW YORK REPORT, *op. cit. supra* note 2, at 145-146.

⁴⁰ COMMISSION REPORT, *op. cit. supra* note 3, at 326-331.

⁴¹ Based on The Magnuson Act, 50 U.S.C.A. 191, and implementing Executive Orders.

⁴² COMMISSION REPORT *op. cit. supra*, note 3, at 353.

New York Report comes directly to grip with the danger which Mr. O'Brian exposed in his lectures. The report says, "A grave objection to the Port Security Program is that its continuance in peacetime opens the way for the *introduction of personnel security measures throughout American life*. For it imposes security scrutiny on persons and in areas without special justification."⁴³ (Emphasis added).

The lack of justification for this program is that the dangers it ostensibly guards against, *e.g.* sabotage to shipping and dock facilities and courier service by subversive seamen, can be as easily accomplished by passengers or seamen on ships flying foreign flags. The danger to the American way of life arises from the fact—in the New York Committee's opinion⁴⁴—that there are other industrial activities, such as power plants, water systems, bridges and locks, railroad tunnels, which are more sensitive and exposed than the docks and ships, and they can be easily disrupted by persons not even employed on the facilities. The inexorable logic of this situation demands that if one segment of vital facilities requires personnel security clearance of its employees, then other equally important activities throughout industry and business should have its employees cleared as a protection against sabotage. In the words of the New York Report:

Indeed, even this would not suffice, because those who are not employees of important industrial establishments might still sabotage them. *This logic would then lead to peacetime personnel security clearance for almost all citizens. The danger to liberty from such a course should cause us to set ourselves resolutely against it.*⁴⁵ (Emphasis added).

To fight the real threat of sabotage, the Report recommends continued reliance on previously effective counterespionage measures coupled with adequate physical protection of vulnerable installations. Also, the New York Report does not object to a reserve of investigated seamen and longshoremen to be available during times of national emergency.

PROPOSED CIVIL AIR TRANSPORT SECURITY PROGRAM

That the logic of the New York Report referred to above is unassailable is seen by the fact that the Commission Report recommends the establishment of a new security program covering civil air transport. Although it follows the New York Report's logic, it in no way sees the danger to liberty exposed by this logic which is so unmistakably obvious to the New York Committee. The Commission takes the step which the New York Committee believes this nation should resolutely set itself against.

⁴³ NEW YORK REPORT, *op. cit.* *supra* note 2, at 143.

⁴⁴ *Id.* at 143, 144.

⁴⁵ *Id.* at 144, 145.

The reasoning of the Commission establishing the necessity for such a program is worthy of close attention.⁴⁶ It cites statistics which show generally that in the year 1956, fifty-two certificated airlines operating 1,448 aircraft carried 39,171,181 passengers in domestic operations alone, and the Commission believes that "the flow of so many people through such potentially vulnerable areas offers obvious dangers to our national security".⁴⁷ It stresses the susceptibility to sabotage of aircraft operations, although it concedes that flight personnel would more likely sabotage flights other than their own.⁴⁸ In the field of international flights the Commission states that in 1955, 2,439,907 passengers were carried by aircraft to or from the United States and that in the year ending June 30, 1956, more travelers crossed the Atlantic Ocean to and from the United States by air than by steamship.⁴⁹ The employees engaged in domestic traffic numbered, as of 1956, 95,468 and in international traffic 26,656.⁵⁰

After pointing out the vulnerability of domestic air transport to sabotage and usefulness to couriers, the Commission Report plumps for personnel security clearances for only those engaged as crew members in international flights ("These employees are in especially strategic positions to serve as secret couriers for hostile powers or to engage in actual espionage."⁵¹), and for those employees who have access to air transport facilities which are to be designated by the Civil Aeronautics Board as "restricted".⁵² Other personnel, whether domestic crew members or personnel who don't actually enter into the proposed "restricted" areas, are not included.

While the Commission is subjecting to personnel security clearances these two groups of American citizens engaging in their civilian pursuits because of the ascertained dangers from sabotage, espionage and courier service, no measures are advanced to protect against the activities of the 39,171,181 domestic passengers and the 2,439,907 international passengers. Nothing is suggested for the crews of foreign international airlines who might act as couriers or espionage or sabotage agents. Likewise, there is no screening procedure proposed for those people, whoever they might be, that send things via air mail or air parcel post.

The Commission takes pains to point out on page 511 that the minimum requirements for security which it is recommending "are no more rigorous than the *present* requirements for access to *confidential*

⁴⁶ COMMISSION REPORT, *op. cit. supra* note 3, at 504-511.

⁴⁷ *Id.* at 505.

⁴⁸ *Ibid.*

⁴⁹ *Id.* at 507.

⁵⁰ *Id.* at 508.

⁵¹ *Id.* at 507.

⁵² *Id.* at 508.

information in the case of employees of *industrial organizations* working on Federal contracts." (Emphasis added). The Commission apparently forgot that on pages 304 and 305 it had recommended the abolition of the "confidential" classification as to all future information and materials in the Industrial Security Program, because "the industrial process is such that the various phases of a confidential contract are so dispersed that it would be virtually impossible for an employee to assemble this information to the detriment of the national security,"⁵³ and "In the light of information available to the Commission from the Department of Defense, it is the opinion of the Commission that the risk is so small, considering the cost and delays incurred in the program, that the program is unjustified."⁵⁴ If the national security is not sufficiently benefited to maintain the present program covering access to information classified "confidential" in industrial organizations working on federal contracts, is there any reason to believe that the minimum requirements of security in that program would materially enhance the national security when applied to other industries such as civil air transport?

Also, the Commission states that in view of the sensitivity of air transport facilities and aircraft to sabotage, it "might be assumed that the federal government and the air transport industry had taken action to establish a security program for personnel and facilities."⁵⁵ It then says, "In fact, however, little has been done, although basic legislative authority was enacted in 1950."⁵⁶ The Commission does not speculate as to whether the Federal Government and the air transport industry failed to take action because they found such a security program unnecessary and/or undesirable.

PROPOSED LEGISLATIVE BRANCH PROGRAM

"The Commission believes that the necessity for an employee screening program in the Legislative Branch is incontrovertible."⁵⁷ To help justify this the Commission quotes from a speech made by Senator William E. Jenner, then Chairman of the Senate Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, who made the following objective and uncontroversial statement:

Charles Kramer, also a party member, was counsel for Senator Wagner's Senate Labor Committee, and practically wrote the Wagner Act, which changed American free trade unionism into a centralized collectivist, state-directed unionism,

⁵³ *Id.* at 176.

⁵⁴ *Id.* at 305.

⁵⁵ *Id.* at 505.

⁵⁶ *Ibid.*

⁵⁷ *Id.* at 101.

until the Taft-Hartley Act reversed the trend.⁵⁸

Having laid a firm foundation on such as the above quotation, the Commission proceeds to give a clear demonstration of its *modus operandi* in studying the need and operations of government security. It says:

While the Commission has *neither the authority nor the means to verify* the extent of the Communist attack upon, or infiltration of the Congress, it would *appear indisputable* not only from the statements above, the methods and goals of the Communist conspiracy generally, and from the application of common sense that the legislative branch is a target of the Soviet and the Communist Party and an adequate screening program for its employees is not only in order, but *urgently imperative*.⁵⁹ (Emphasis added).

It should be noticed, however, that the Commission does not recommend that Congressmen themselves be adequately screened, although it would appear equally indisputable that they are in positions from which they could do great damage to the national security.

PROPOSED JUDICIAL BRANCH PROGRAM

Pursuing the general principle that all employees of the federal government—executive, legislative and judicial—should be subject to at least a minimum investigation to insure that they are loyal and otherwise suitable from the standpoint of national security, the Commission sees no valid reason why an employee of the judicial branch should not be screened as to his basic loyalty to the United States, thus assuring the judiciary proper and American public that those who carry the administrative responsibilities of the courts or assist in the preparation of decisions are loyal, dependable Americans.

Citing nothing and quoting no one, the Commission Report finds a basis for its recommendations in the following fashion:

In the judicial branch, the possibilities of disloyal employees causing damage to the national security are ever present. As an example, Federal judges, busy with evercrowded court calendars, must rely upon assistants to prepare briefing papers for them. False or biased information inadvertently reflected in Court opinions in crucial security, constitutional, governmental or social issues of national importance could cause severe effects to the nation's security and to our Federal loyalty-security system generally.⁶⁰

Again, as in the case of Congressmen, the Commission does not recommend that judges themselves be cleared.

⁵⁸ *Id.* at 102.

⁵⁹ *Ibid.*

⁶⁰ *Id.* at 106.

It is necessary at this point to quote from the vigorous dissent to this recommendation which Commissioner James P. McGranery, former Attorney General of the United States, makes on page 806 of the Report. Referring to the statements set out above, he says, "This journey into a fanciful world has summoned up a hypothetical judge who is not only lazy and confused but almost unconscious—certainly unaware that his opinion is 'inadvertently' reflecting false or biased information. This member of the Commission is happy to report that no evidence was presented at Commission conferences tending to indicate that such a judge is now a member of the Federal judiciary, by appointment of the President of the United States with the advice and consent of the Senate." In addition, the former Attorney General makes the following points:

1. No evidence was presented that at any time in United States history did a judge menace national security by being "busy with ever-crowded court calendars" or by inadvertent acceptance of "false or biased information."
2. The Commission's recommendation is irrelevant to the scope of the Commission inquiry.
3. The Commission's recommendation is not based on any need that has been demonstrated by facts ascertained or ascertainable.
4. The Commission's recommendation is a gratuitous conclusion drawn from premises that are purely conjectural.
5. Commissioner McGranery regretted the unwarranted intrusion into the judicial branch of our government by the recommendation respecting judicial branch employees.⁶¹

EVALUATION

Because of the Commission Report's treatment of the application of the loyalty-security program to all executive branch employees, international organizations' employees, seamen, longshoremen, civil air-transport personnel, congressional employees, and Court employees, as contrasted with the New York Report's "functional" treatment of the necessity for coverage, the writer believes that the climate of freedom-for-the-individual which, rather than any material comforts, makes this great republic of ours worth protecting, would be gravely impaired if the recommendations of the Commission on Government Security were carried out. Enough examples have been shown to justify the conclusion that the Commission's thinking was dominated by the thoughts that (1) every federal employee must be certified loyal as a matter of abstract principle regardless of the monetary and moral costs and regardless of the sensitiveness of the position; and (2) this nation is in mortal danger from sabotage and espionage from—if the Commission's premises and logic are correct—practically everybody. The New York

⁶¹ *Ibid.*

Committee in April of 1956 pointed out where such a logic would lead and explicitly warned against it;⁶² the Commission on Government Security in June of 1957 wholeheartedly embraced the logic and completely ignored the warning.

The seed of freedom does not thrive in a hot bed of investigations, dossiers, informants, screenings, hearings and appeals. To the writer too much of the Commission's recommendations extending the scope of personnel security clearances are—to borrow Commissioner McGranery's phrase—"gratuitous conclusion (s) drawn from premises that are purely conjectural".⁶³ In the balance, the harm to our free way of life as individuals and citizens is outweighed by the harm disloyal people can do when those who are disloyal are in positions having access to highly classified material and information, and can make decisions which bear substantially on the national security. The objective in protecting our nation from its enemies is to preserve our freedom; suffocating our freedom in a miasma of clearances for everybody is not preserving it—that is killing it.

The recommendations of the Commission on Government Security for continuing and extending the personnel security clearance programs, which reflect the Commission's deeply held belief in the great dangers which exist today from disloyal American citizens and is coupled with an abiding faith in the efficacy of an ever-expanding loyalty-security program, amount to the greatest substantive changes proposed by the Commission. Federal action called for by the inexorably logical conclusions to be drawn from the Commission's premises would affect nearly every American's right to privacy and would inject the government into areas heretofore free of governmental control. The climate inevitably created by such measures would not be such as to be known as the "Golden Age of American Freedom".

FREEDOM OF THE PRESS

On page 737 of the Commission Report there is a proposed amendment to Chapter 37 of Title 18 of the United States Code (relating to espionage and censorship) which provides substantially that (a) it is unlawful for any person who has obtained information classified "top secret" or "secret" to communicate any part thereof to any person who is not authorized by law to receive such information and (b) whoever, having obtained in any manner or by any means any information so classified, wilfully communicates any part of such information in any manner or by any means to any person not authorized to receive such information, with knowledge or reason to believe that such information is so classified and that such person is not so authorized to receive such information, shall be fined not more than \$10,000.00 or

⁶² NEW YORK REPORT, *op. cit. supra* note 2, at 144.

⁶³ COMMISSION REPORT, *op. cit. supra* note 3, at 806.

imprisoned not more than five years, or both.

The basis for this recommendation seems to rest primarily, if not entirely, in the next to the last paragraph of Chairman Loyd Wright's personal statement concerning the work and accomplishment of the Commission. It is Chairman Loyd Wright's personal opinion that:

No citizen is entitled to take the law, and the safety of the Nation, into his own hands. With near unanimity, the American journalism profession has conscientiously observed these limits (of not disclosing classified information). The purveyor of information vital to national security, purloined by devious means, gives aid to our enemies as effectively as the foreign agent. I commend to the special consideration of the Congress the Commission's proposal for unequivocal prohibition of such irresponsible and unauthorized disclosure and for vigorous prosecution of every offender.⁶⁴

The reaction from the American press was immediate, determined and highly vocal.⁶⁵ The gist of the press argument is that (1) Chairman Wright cites not one instance in the Report to justify his assertions and (2) when Chairman Wright says, "The final responsibility for the difficult decisions of what shall be secret must be confided in these loyal and devoted public servants who are qualified to make the judgment,"⁶⁶ he is inviting the burying of chicanery, stupidity, error and plain old dishonesty under a smokescreen of "top-secret" and "secret" stamps wielded by government employees with something to hide.

Chairman Wright expresses confidence in the loyal and devoted public servants who exercise their authority to classify, but the Commission Report itself recognizes that there are some genuine problems related to overclassification within the government when it says:

Greater caution should be exercised in the assignment of classification; classification should be evaluated on a more realistic basis. Attempts through classification to hide the elephant in the middle of the prairie serve only to weaken the entire security system by trying to safeguard more than it is possible to safeguard properly.

The Commission wishes to point out however, that the relatively small number of individuals who have authority to apply defense classifications to documents or material is overbalanced by the great number of individuals who in the course of their work have the authority to recommend defense

⁶⁴ *Id.* at 688.

⁶⁵ E.g. Letter dated July 2, 1957 from Walter Millis to the New York Times, published July 7, 1957; Marquis Childs, Washington Post and Times-Herald, July 5, 1957.

⁶⁶ COMMISSION REPORT, *op. cit.* *supra* note 3, at 688.

classifications for documents or material within their area of activity. As a practical matter, these individuals have de facto authority to classify since *it is patently impossible in most agencies for the responsible official to look behind the justification for each instance of document classification.*⁶⁷ (Emphasis added.)

If the Commission Report is correct in its assessment of the practical situation as quoted above, then there would appear to be some merit to the press claim that the abuse of classification could be used to hide scandal, *e.g.* Teapot Dome, and information legitimately within the public's right to know. The argument of the American press to be free of this new restraint on its duty to keep the public informed takes on even greater weight when it is remembered that Chairman Wright gave no specific examples of the national security being damaged by unauthorized disclosures of classified information by the press and that the Commission itself merely proposed the legislation without specifically treating the issue in a separate section.

The traditional function of our free American press could be appreciably changed under the impact of such a severe law which could be used to protect the acknowledged potential and actual abuse of the power to classify information by government employees. Thus freedom of the press is affected directly by the recommendations of the Commission on Government Security.

TRAVEL BY ALIENS; FOREIGN AFFAIRS

The writer believes that the manner in which the foreign affairs of our nation are conducted reflect in recognizable degree the current state of national thinking at any particular time. If this is so, then it is reasonable to look for the effect which the thinking of the Commission on Government Security, as translated into recommendations, might have on the conduct of American foreign affairs, especially with regard to travel by aliens to and from the United States.

Issuance of Visas

The admission of aliens to this country directly affects our relations with the countries from which these aliens come. Large numbers of people are involved here with more than 1,000,000 aliens admitted to the United States for the fiscal year ended June 30, 1956 of which 321,625 sought permanent residence.⁶⁸ Border crossings by aliens, which includes the Canadian and Mexican borders, amounted to 61,611,311 for fiscal 1955.⁶⁹

Under the Walter-McCarran Act, which is the Immigration and

⁶⁷ *Id.* at 179, see also 164.

⁶⁸ *Id.* at 570.

⁶⁹ *Id.* at 572.

Nationality Act of 1952,⁷⁰ the Bureau of Security and Consular Affairs was created in the Department of State and the Visa Office was placed within that bureau. It coordinates the work of American consular officials in foreign countries which issue visas for travel to this country after screening and documenting those aliens seeking admission. After the alien travels to this country, he must be passed by the Immigration and Naturalization Service of the Department of Justice which is not bound to admit the alien, since the visa is not an entry permit but an endorsement on a passport or other travel document which entitles the alien to travel to and apply for temporary or permanent admission to this country.

Because of the fact that the Department of Justice, through its Immigration and Naturalization Service, has turned down aliens with properly issued American visas, there is confusion to the alien and expense to the transportation firm which brought him,⁷² and it is the recommendation of the Commission,⁷³ as well as of the Hoover Commission,⁷⁴ that the Visa Division—except for the issuance of diplomatic and official visas—be transferred to the Department of Justice, utilizing the authority granted by the Walter-McCarran Act⁷⁵ to the Department of Justice to establish offices and detail employees of the Immigration and Naturalization Service to duty in foreign countries “with the concurrence of the Secretary of State”.

The Secretary of State has repeatedly refused to consent to this transfer of the visa function to the Department of Justice.⁷⁶ Besides the belief that it has better sources of information plus better qualified personnel for foreign duties, the Department of State believes that it and the Foreign Service are the internationally accepted channels for communication with foreign governments, and except in routine cases it would not be wise to permit communications in potentially controversial cases to be handled by another agency except through the Visa Office of the Department of State.⁷⁷ Also, the issuance of visas to aliens directly involves relations between the United States and the foreign countries of which the aliens are nationals, and that, in many cases, questions of policy and trade relations must receive full consideration as well as security. If the review of visa cases were to be placed in the hands of the department responsible for security alone, there might be an overemphasis on the security phase of a case.⁷⁸

⁷⁰ 8 U.S.C.A. 1101-1503 (1952).

⁷¹ COMMISSION REPORT, *op. cit. supra*, note 3, at 550.

⁷² *Id.* at 572.

⁷³ *Ibid.*

⁷⁴ *Id.* at 577.

⁷⁵ Section 103.

⁷⁶ COMMISSION REPORT, *op. cit. supra* note 3 at 574.

⁷⁷ *Id.* at 577.

⁷⁸ *Id.* at 576.

It is the Commission on Government Security's position that: "To insure maximum security in this area, responsibility properly must be concentrated in the agency the Congress has always intended shall make final determination of admissibility or inadmissibility. To achieve that goal, there must be a realignment to insure complete control by the Immigration Service from the time the alien first makes application for a visa right down to the moment he first sets foot on the American shoreline."⁷⁹ It seems fair to assume that it is the Commission's belief that this would have appreciably reduced the 177 subversive aliens it was necessary to deport—out of the millions involved—from July 1, 1950 to June 30, 1955.⁸⁰

"Bonded Transit" Aliens

Section 238 (d) of the Immigration and Nationality Act of 1952 (Walter-McCarran Act) provided that the Attorney General shall have power to guarantee the passage through the United States in immediate and continuous transit of aliens whose destinations were foreign countries, and thereafter, the Attorney General and the Secretary of State issued regulations waiving—subject to certain specified conditions—the requirement for visas for such aliens.⁸¹ The Commission manifested "considerable attention"⁸² in the situation created by the discretion exercised, and the waivers granted, by the Attorney General and the Secretary of State under this act, and set out a detailed review of the circumstances surrounding the landing by Pan American or similar airlines in the United States of Russian scientists attending an international conference in Mexico City, Russian athletes who had attended the Olympic Games in Australia, and a Soviet agricultural mission.⁸³ It is the conclusion of the Commission that "the waiver provisions of the Immigration Act have been invoked by both the Attorney General and the Secretary of State in a manner inimical to the security of the United States."⁸⁴ (Emphasis added).

The Commission points out that, as in the case of the Russian scientists attending the Mexico City meeting, the Russian Olympic contingent did not apply for visas and therefore were not fingerprinted. In fact, "while they were in Los Angeles a tour of Hollywood was arranged by Pan American before their departure for Copenhagen."⁸⁵ In tracking down this whole thing, the Commission received a reply from the Department of State on December 28, 1956 which confirmed information in its hands that this Olympic contingent had been granted

⁷⁹ *Id.* at 578.

⁸⁰ *Id.* at 571.

⁸¹ *Id.* at 556.

⁸² *Id.* at 598.

⁸³ *Id.* at 592-602.

⁸⁴ *Id.* at 593.

⁸⁵ *Id.* at 598.

a waiver to land on or about December 12, 1956 in Los Angeles on the basis of "unforeseen emergency." This letter received by the Commission showed clearly that the Attorney General and the Secretary of State had "foreseen" that this "unforeseen emergency" would occur in December, when they agreed back in August of 1956 that this waiver was to be granted.⁸⁶ "The excuse offered (by the Department of State) was that 'it did not appear to be in the best interests of the United States to refuse to cooperate with the holding of the Olympics or to do anything which might be interpreted as interference with competitors to the American teams.'"⁸⁷

The Commission then goes on to say:

In the course of the Commission's investigation, we were continuously reminded by the Immigration Service, representatives of airlines and trade associations that there are no instances of record where a subversive has ever gained admission to the United States in bonded transit. *This by no means discounts the possibility that it has happened or that it can happen, even though there is no present official knowledge of such an occurrence.* The Commission also desires to point out that the airlines and the Immigration Service have both admitted that no security check is made of airline or non-governmental agency personnel assigned to maintain surveillance of aliens traveling in bonded transit.⁸⁸ (Emphasis added).

This then explains the Commission's recommendations for tightening up the bonded transit alien provisions.⁸⁹

Soviet Bloc Nationals Who Enter As Government Officials

"The Commission recommends discontinuance of the practice of admitting artists and others under the guise of their being official government employees. This practice appears to be in violation of the law."⁹⁰ Some of those listed under this category are a Soviet pianist and cellist, a Polish pianist, five Soviet Baptists, and eight Soviet churchmen sponsored by the National Council of Churches.⁹¹

Requiring Visas For All Foreign Crewmen

Section 221(S) of the Immigration and Nationality Act of 1952 provides, *inter alia*, that foreign crewmen of a ship or aircraft can still disembark, if they have passports and if they are listed on a crew list visaed by a consular officer, until such time as the United States can

⁸⁶ *Id.* at 597.

⁸⁷ *Id.* at 598.

⁸⁸ *Ibid.*

⁸⁹ *Id.* at 592.

⁹⁰ *Id.* at 605.

⁹¹ *Id.* at 605.

practicably issue visas for each individual crewman.⁹² As of July 31, 1955 only 42,921 visas of this type had been issued, so early in this session of Congress the Eisenhower administration sponsored a "bill which would amend section 221(S) to eliminate the requirement for individual documents on the ground that this requirement of the act has proved to be difficult to administer, unduly burdensome and unnecessary".⁹³

Relying on the contrary views expressed by a special subcommittee of the House Committee on the Judiciary, the "Commission believes that a substantial security problem is involved and that an acceptable system for the issuance of visas or some similar type of documentation can best be handled by the Immigration Service in the performance of its duties at the various ports of entry".⁹⁴

Possible Significance to the Conduct of Foreign Affairs

The Commission has discovered and criticized the cooperation of the Secretary of State and the Attorney General in possible technical violations of the Immigration and Nationality Act of 1952 in permitting Russian Olympic teams to stop-over in bonded transit and admitting Soviet and Polish artists and churchmen as government officials. The Commission should be commended for wanting the law upheld, but in a study of this nature it would seem pertinent to ask why such responsible men as the Secretary of State and the Attorney General chose to ignore the law. Could it be that the strictures imposed by the Immigration and Nationality Act of 1952 place an unnecessary and impossible burden on the conduct of American foreign policy which it is the primary responsibility of the President of the United States to conduct, and for which purpose the Secretary of State is appointed? Given the state of the world today; the reliance which this country places upon its world-wide series of alliances with foreign powers; and the attempts, however tentative, to ease the cold-war tension with the Soviet Union and its now somewhat less than totally subservient satellites, it can fairly be asked if the increase in "security" which the commission apparently believes its collection of recommendations in this field would achieve, does not fall short of the overall security to be gained through an executive branch flexibly conducting foreign affairs without restrictions of this type.

In the conduct of foreign affairs, the effect of the Commission's recommendations is to shear the State Department of its visa function on the assumption that Department of Justice personnel would do a better job in so far as security is concerned. Could Immigration and Naturalization Service personnel overseas be counted on to be better

⁹² *Id.* at 603.

⁹³ *Ibid.*

⁹⁴ *Id.* at 604.

qualified and enjoy better sources of information than State Department and Foreign Service personnel, when looked at from the overall foreign affairs point of view? In the bonded transit alien episodes, isn't it possible that the Secretary of State and the Attorney General were forced into manufacturing a "foreseeable unforeseen emergency" because of the inadequacies of the statute involved? (Who was really in greater danger—Hollywood or the Russian Olympic athletes?) With regard to the Russian concert artists and churchmen, the Commission apparently was unconcerned as to *why* the alleged violation of the law was permitted by the Executive branch agencies. Could it be that that gentle subterfuge was felt necessary as a matter of foreign policy? In dealing with foreign crewmen, the administration has found the requirement for individual visas to be difficult to administer, unduly burdensome, and unnecessary, but the Commission sides with a House Subcommittee in feeling that the continued absence of such visas presents a substantial security problem.

The writer believes that the attempt by the legislative branch to accomplish "maximum security" through greater elaboration of the Immigration and Nationality Act of 1952 portends greater difficulty for the executive branch in conducting American foreign affairs wisely. If carried on farther, it could represent a serious weakening on the part of the President to shape and execute foreign policy.

WIRETAPPING

The Commission Report devotes only little more than three pages to its treatment of information obtained by wiretapping.⁹⁵ "The Commission recommends that a separate wiretapping law be enacted which would eliminate the evidentiary disability ascribed to information procured by wiretapping in criminal prosecutions only for violations of our security laws".⁹⁶ The proposed bill drafted by the Commission⁹⁷ permits the Federal Bureau of Investigation, and the investigation agencies of the Army, Navy and Air Force to employ this technique ". . . upon express written authorization given by the Attorney General to the head of such agency . . . if that interception is specifically described as to place and time in the authorization so given."

The Commission believes that "the requirement that authorization for the wiretap be obtained personally from the Attorney General should allay any apprehensions that the authority will be used indiscriminately for the mere purpose of invading the privacy of American citizens".⁹⁸ Considering the press of duties of the Attorney General of the United States, a reasonable man might well be a little apprehensive as to the

⁹⁵ *Id.* at 627-630.

⁹⁶ *Id.* at 629.

⁹⁷ *Id.* at 735.

⁹⁸ *Id.* at 630.

attention which this man might be able to give to the requests for wiretap authorizations coming from the Federal Bureau of Investigation and such investigative agencies as the Counter Intelligence Corps of the Army, the Office of Naval Intelligence and the Office of Special Investigations of the Air Force. With the programs as broad as the Commission thinks they need to be, this could well mean a volume of requested authorizations of such magnitude that the apprehensions as to the indiscriminate invasion of the privacy of American citizens would not be allayed. At any rate, if enacted, this statute would represent one more inroad into the precious reserve of privacy left to an individual citizen of these United States.

THE ATTORNEY GENERAL'S LIST

The Attorney General's list of subversive organizations, which was first published openly in the *FEDERAL REGISTER*⁹⁹ in 1948 and has now around 300 organizations listed, was originally compiled before that time for the purpose of confidentially advising the various executive departments that the organizations listed were Communist or otherwise subversive in nature. Since its public disclosure, it has been the object of much criticism as having serious weaknesses and being misapplied.¹⁰⁰

An interesting insight into the respective frames of reference from which the New York Committee and the Commission on Government Security approached this huge and vitally important problem of loyalty-security might be gained from the first sentences of their respective recommendations regarding the Attorney General's list. The New York Report says, "The Attorney General's list of subversive organizations *should be abolished*, unless it can be and is modified and revised in the following respects. . ."¹⁰¹ The Commission Report says, "The Attorney General's list *should be retained* with the modifications listed below."¹⁰² (Emphasis added.)

The New York Committee believes that the abolition of the list would not weaken in the slightest the assistance which the Attorney General could and should give the executive departments having personnel security programs, because on request the Attorney General would supply any information in his possession on organizations whose nature was relevant to a security inquiry in the requesting department.¹⁰³ Since its original purpose was to provide information for the Federal executive departments alone, the publication generally of the Attorney General's list is not essential.

⁹⁹ 13 FED. REG. 1471 (1948).

¹⁰⁰ COMMISSION REPORT, *op. cit. supra* note 3, at 100, 645 *passim*.

NEW YORK REPORT, *op. cit. supra* note 2, at 154-157.

¹⁰¹ NEW YORK REPORT, *op. cit. supra* note 2 at 154.

¹⁰² COMMISSION REPORT, *op. cit. supra* note 3, at 96.

¹⁰³ NEW YORK REPORT, *op. cit. supra* note 2, at 157.

However, if the list is to be retained, the New York Report says it should be revised as follows:

- (1) The list should not include any organization which has been defunct more than ten years. (Any information needed concerning removed defunct organizations could still be requested from the Department of Justice.)
- (2) The list should give information as to the period and the general nature of the subversive activity of each organization listed.
- (3) The list should be kept up to date by periodical supplements eliminating long defunct organizations and adding organizations newly found to be subversive.
- (4) The list should include only those organizations which have been given notice and an opportunity to be heard in conformity with the requirements of due process of law.
- (5) The list should contain a statement that mere membership in any of the organizations listed is not in itself to be construed as establishing the subversive character of a member unless membership has been made illegal by statute.¹⁰⁴

The Commission report recommends the retention of the list with modifications which bring it appreciably into line with the New York Report's list, revised as above described, although the New York Report believes first that the list should be abolished and retained only if corrected. The Commission Report's suggested changes would supply information as to the period and nature of the subversive complexion of the organization and would require notice and an opportunity to be heard for the organization. However, the Commission Report, unlike the New York Report, does not provide for judicial review of the final determination by the Attorney General.¹⁰⁵ The Commission does stress that care must be taken to avoid misinterpretation of affiliation with one of these organizations, and that the mere fact of membership should not be conclusive evidence of the individual's unfitness for employment.¹⁰⁶

Thus, to some extent at least, while the New York Committee and the Government Commission may have opposite views on the substantive question of whether there should be such a list, they do approach a common ground when it comes to a question of procedure if the list is to be continued.

PROCEDURES

Because the Commission on Government Security's study "has shown that the uncoordinated and often inefficient and ineffective loyalty-

¹⁰⁴ *Id.* at 154.

¹⁰⁵ *Id.* at 156. COMMISSION REPORT, *op. cit. supra* note 3, at 98.

¹⁰⁶ COMMISSION REPORT, *op. cit. supra* note 3, at 100.

security programs now in force seriously need central direction of a type permitting the sound conduct of official business yet insuring that neither the Government's security is jeopardized nor the rights of the individual infringed",¹⁰⁷ the Commission has recommended the establishment of a Central Security Office which would provide the needed uniform and coordinated administration of the loyalty-security programs.¹⁰⁸ The New York Committee similarly recommended the creation of an Office of Director of Personnel and Information Security which could act to reduce or eliminate the present lack of uniformity and supervision and diversity of methods of administration.¹⁰⁹

Without attempting to compare closely the similarities or differences between the respective recommendations of the Commission and the Committee concerning the central agency, it is difficult to ignore the different stages at which the two groups think the central agency should first come into the personnel security clearance process. The Commission characterized the present hearing board operations as being of a "desultory nature",¹¹⁰ and recommends that a hearing conducted by a full-time, specially qualified and trained hearing examiner, appointed by the Director of the Central Security Office, be the first stage at which the central agency would come into a particular case.¹¹¹ This hearing stage, of course, comes after an original investigation and screening to determine whether or not the derogatory information warrants the hearing. The Commission rejects the contention that the central agency should handle the screening stage primarily on the grounds that the head of the agency concerned has the ultimate responsibility for the disposition of each case and also should make the initial decision as to whether loyalty charges should be made.¹¹²

This is an extremely vital point in the future operation of the federal loyalty-security programs, and to the writer the reasoning supporting the different recommendation of the New York Committee is more persuasive. Noting that a high percentage of persons are cleared after security charges are filed against them, the New York Committee concludes that this reflects care on the part of hearing boards but laxity in the filing of charges.¹¹³ The Committee then says, "The filing of security charges has such a tremendous impact upon persons directly and indirectly involved, and constitutes such significant waste of manpower through suspension of persons charged and involvement of government personnel in the administration of the procedures, that every effort

¹⁰⁷ *Id.* at 633.

¹⁰⁸ *Id.* at 633-643.

¹⁰⁹ NEW YORK REPORT, *op. cit. supra* note 2, at 137-140.

¹¹⁰ COMMISSION REPORT, *op. cit. supra* note 3, at 636.

¹¹¹ *Id.* at 61-66.

¹¹² *Id.* at 58.

¹¹³ NEW YORK REPORT, *op. cit. supra* note 2, at 159.

should be made to file charges only when a substantial security issue is involved."¹¹⁴ The Committee makes the analogy that the screening board of the central agency would function like a grand jury.¹¹⁵ The interest of the particular agency involved would be protected under the New York Committee's scheme by having the hearing conducted by a hearing board appointed by the head of the agency, and the final security determination would be made by the head of the charging agency.¹¹⁶

The relative merits of these two suggestions, i.e., the central screening board prior to an agency hearing as proposed by the Committee, and the agency screening prior to a central hearing examiner as proposed by the Commission, need careful weighing. If the aim is to reduce the number of ill-founded charges formally brought, it would appear that the Committee's recommendation is better suited. This is one procedural matter which can affect the entire atmosphere in which the persons covered by these programs live and work. It is such an important point that Dudley B. Bonsal, Chairman of the New York Committee, was moved to write that, "The screening and hearing processes are, of course, the heart of the programs. Objectivity and open-mindedness by the screening and hearing authorities are essential and these are not likely to flow from the Commission's recommendation."¹¹⁷

¹¹⁷ Letter to The New York Times, July 14, 1957 in Letters to Editor Column.

Two of the special studies made by the Commission were "Confrontation"¹¹⁸ and "Subpena Power",¹¹⁹ and the New York Committee made recommendations covering "Appearance of Witnesses and Confrontation."¹²⁰ Suffice it to say here that to whatever extent the various procedural recommendations made by the two studying groups enlarge or restrict the freedom of the individual, they at least evince the recognition on the part of the two groups that the procedures presently employed are in need of improvement.

DOCUMENT AND INFORMATION CLASSIFICATION AND THE INDUSTRIAL SECURITY PROGRAMS

The Department of Defense Industrial Security Program and the Atomic Energy Commission Industrial Security Program affect the jobs of the employees of the respective agency contractors on the basis of whether or not the particular employee has access to information which is classified as either "confidential", "secret" or "top-secret". Thus, it is access-to-information clearance and not employment clearance as in the other federal loyalty-security programs.¹²¹

¹¹⁴ *Id.* at 160.

¹¹⁵ *Ibid.*

¹¹⁶ *Id.* at 168, *passim*.

¹¹⁸ COMMISSION REPORT, *op. cit. supra* note 3, at 657.

¹¹⁹ *Id.* at 673.

¹²⁰ NEW YORK REPORT, *op. cit. supra* note 3, at 173.

¹²¹ *Id.* at 64.

It is on this point that the Government Commission and the New York Committee seem to start off on the same premises, apply the same reasoning process and come out with the same recommendations. Substantively, this is an unusual occurrence for these two reports.

The Government Commission succinctly recommends "the abolition of the 'confidential' classification of all future defense information and materials".¹²² It does this because the phrase "could be prejudicial to the national security", which is the definition for the "confidential" classification in Executive Order 10501 of 1953,¹²³ is "so vague and broad as to furnish no reasonable basis for its application".¹²⁴ Furthermore, "Any risk involved in the abolition of confidential, at least so far as the industrial security program is concerned, is minimized by the fact that the various industrial phases of a confidential contract are so dispersed as to make it virtually impossible for any employee to assemble the information to the detriment of the national security".¹²⁵ It should also be borne in mind that clearance for industrial employees having access to "confidential" information is granted by the private industrial contractor merely on the basis of the employee's citizenship and the lack of any derogatory information relating to such employee in the files of the private contractor.¹²⁶ Therefore, the Commission recommends the elimination of the "confidential" classification because ". . . the disadvantage arising out of the confidential category, in the light of the risk, the nature of the information and materials falling within that category, and the cost and delay involved, outweigh any advantages to the national security to be derived from its retention".¹²⁷

This obviates the necessity of private industrial contractors clearing those employees working on contracts classified "confidential".¹²⁸ (For the Department of Defense Industrial Security Program alone, the New York Committee learned that the number covered by the program would be reduced from nearly 3,000,000 to only about 800,000,¹²⁹ and it is of the belief that the reduction of the number of persons covered by all of the programs, industrial and otherwise, would enhance rather than lessen the national security.)¹³⁰ Further in line with curtailing the number of persons covered by the industrial security program is the recommendation by the Commission that power to apply defense classifications not be expanded and that only those agencies now having such

¹²² COMMISSION REPORT, *op. cit. supra* note 3, at 174.

¹²³ 18 FED. REG. 1049 (1953); NEW YORK REPORT, *op. cit. supra* note 2, at 246.

¹²⁴ COMMISSION REPORT, *op. cit. supra* note 3, at 174.

¹²⁵ *Id.* at 176.

¹²⁶ *Id.* at 175.

¹²⁷ *Id.* at 176.

¹²⁸ *Ibid.*

¹²⁹ NEW YORK REPORT, *op. cit. supra* note 2, at 146.

¹³⁰ *Ibid.*

authority should continue to possess defense classification authority.¹³¹ The Commission also recommends that each agency should make every effort to reduce the number of employees having the authority to classify or to recommend classification.¹³²

The performance of the Government Commission in analyzing the operation of the document and information classification-industrial security programs displays a functional approach to the problem of security and shows what can be done when the approach is not colored by a hyper-sensitive assessment of the damage which the lowliest worker in the least sensitive government job can do to the national security. Or it may be that the approach of the Commission elsewhere really betrays its belief that as a matter of doctrine every government employee, no matter how unrelated to a sensitive position he may be, must at least be stamped loyal if not pure.

AN APPRECIATION

Locked within Mr. O'Brian's list of inroads into our American conception of fair play is an understanding and evaluation of what freedom for the individual has meant and should continue to mean in our American society. It is a deep, basic point of view. An echo of this point of view may be found in a letter written to the New York Times by Dudley B. Bonsal, Chairman of the New York Committee, after the publication of the Government Commission Report. He said, "We [the bar association committee] believe, as American citizens, that programs of this type are alien to our fundamental beliefs, obstruct the liberty of our citizens and can only be justified on the basis and within the limits of a clear and present danger."¹³³ The writer was not able to discern any comparable credo in the Report of the Commission on Government Security, which may help to explain the different results achieved by the Commission on Government Security and the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York.

¹³¹ COMMISSION REPORT, *op. cit. supra* note 3, at 77.

¹³² *Id.* at 179.

¹³³ Letter to The New York Times, *op. cit. supra* note 117.